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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

No. 205

GLOBE LIQUOR COMPANY, INC., A Corporation,
Petitioner,

vs.

FRANK SAN ROMAN and DOROTHEA SAN ROMAN,
Doing Business Under the Firm Name and Style of International Industries,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RESPONDENTS' PETITION FOR REHEARING AND RESPONSE TO PETITIONER'S PETITION FOR REHEARING.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now come Frank San Roman and Dorothea San Roman, doing business under the name and style of International Industries, the respondents, by Nat M. Kahn, their attor-

ney, and present their petition for a rehearing in this suit and their response to petitioner's petition for a rehearing.

Respondents present the following summarized reasons for their petition for rehearing, which are briefly amplified later. These summarized points are:

(1) No matter how many times this case might be retried, since the basic and essential facts are undisputed and fully developed, the ultimate result will be the same, namely, that the respondents do not owe the petitioner anything, as the respondents refused to warrant the goods, and the petitioner cannot recover on either an express or an implied warranty.

(2) This Court apparently overlooked the well-settled rule that the respondents' motion for a new trial exercised the same function as a motion for judgment under Rule 50(b) of the Federal Rules of Civil Procedure, so that the trial court had the same "last chance to correct his own errors without the delay, expense or other hardships of an appeal."

(3) This Court should have ruled under its own decisions, that no part of the deposition of Todes was admitted in evidence as the record is clear and conclusive that no part of these depositions were read to the jury.

(4) This Court overlooked in its decision in *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212, and in its decision in the instant suit, the important factor that under Rule 50(b) a trial court, *on its own motion*, may grant a previously reserved motion for a directed verdict for a party after the verdict of the jury is received, *without a post-verdict motion* of either party. Therefore, since the trial court has this power, the Circuit Court of Appeals, on appeal, has the same power.

1.

Retrial of Instant Suit Is Unnecessary and a Burden.

No matter how many times this case might be tried, the result would be the same as the ultimate facts are undisputed and fully developed.

The facts as found by the Circuit Court of Appeals in its opinion are that there was direct privity between the petitioner and the Mexican shipper in the transaction, the respondents were the agents of the Mexican shipper, and there was no express warranty given by respondents to the petitioner.

In addition to these facts as determined by the decision of the Circuit Court of Appeals in the instant case, the record is also clear and undisputed that the shipper made a prompt offer to recondition the goods at his own expense, so that the petitioner would have received all it was entitled to under its bargain. No implied warranty can ever be established in this case because of the conclusive admission of Lazarus, the petitioner's vice-president, that the respondents refused to warrant the goods. Although this admission technically was not admitted in evidence because it was not read to the jury, it is a part of the printed record.

The trial court rejected a proper offer of proof that the net commission of the respondents in the transaction was $342.16 (Rec. 166). Although this evidence was also not technically admitted in evidence, it too is contained in the printed record. It is manifestly unjust for the petitioner to try to saddle a liability of $10,000 on the respondents when the petitioner admitted on several occasions during the course of the trial that it dealt with the respondents as agents. (Rec. 96, 106.)

We believe that under the undisputed facts in this case, a retrial or retrials of this case would be useless and an unnecessary gesture and burden, and that the result of any re-trial would always be the same as that reached by the Circuit Court of Appeals, whether the entire Todes deposition or part of it are considered as having been introduced in the evidence.

2.

This Court apparently overlooked the well-settled rule that the respondents' motion for a new trial exercised the same function as a motion for judgment under Rule 50 (b) of the Federal Rules of Civil Procedure, so that the trial court had the same "last chance to correct his own errors without the delay, expense and other hardships of an appeal."

This point was apparently overlooked by Your Honors in its decision in the instant suit. This "last chance" theory is not spelled out in Rule 50(b) of the Federal Rules of Civil Procedure and is foreign to the wording, history and purposes of the rule, and has been engrafted into the rule by judicial fiat.

The main purpose of Rule 50(b) was to prevent the hardships and expense of re-trials arising from trial courts granting motions for directed verdicts without permitting the jury to make an independent determination of the facts by its verdict. Under Rule 50(b) a party's motion for a directed verdict at the conclusion of all the evidence is always deemed automatically reserved, so that after a jury's verdict is received, the trial court, *on its own motion* while it has jurisdiction of the case, or the parties, by independent motion, within ten days after the reception of a verdict, may make the post-verdict motion provided for under the rule. In this fashion, the

jury's independent determination and verdict on the facts is received and preserved, and if the trial court, either *on its own motion* or on a post-verdict motion of a party, grants a party's previously reserved motion for a directed verdict regardless of the jury's verdict, the Circuit Court of Appeals, on appeal, can make a final disposition of the case without the hardship and expense of re-trials. This was the main and primary purpose of Rule 50(b) and not the "last chance" theory which has been advanced by Your Honors in its decision in the case of *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212, and by this Court's decision in the instant suit.

This Court has overlooked the vital and significant factor that a trial court, *on its own motion*, without the post-verdict motion of either party, can disregard the jury's verdict and enter judgment in favor of the party against whom the jury's verdict was found. (*Western Union Telegraph Co.* v. *Dismay*, 106 F. (2d) 363; *Lux* v. *Western Casualty Co.*, 107 F. 1002; *Demers* v. *Railway Express Agency*, 108 F. 107.)

Obviously, if a trial court has the power, *on its own motion, without the post-verdict motion of either party*, to disregard the jury's verdict and grant a party's previous motion for a directed verdict, we believe it must and should follow that the Circuit Court of Appeals has the same power.

Before the new rules of Civil Procedure went into effect, this Court held in *Baltimore & C. Line* v. *Redman*, 295 U. S. 654, that the Circuit Court of Appeals had the power to reverse the judgment of the District Court and to enter judgment of dismissal on the defendant's motion for a directed verdict, which had been denied by the trial court, and in that case it appears from the opinion that no motion for judgment was made by the appellant in the

trial court. Therefore, it becomes increasingly difficult to understand how a rule of the District Court can destroy the well-settled, historical and statutory power of the Circuit Court of Appeals to make final disposition of a suit where only questions of law are involved. The Federal Rules of Civil Procedure do not apply to Circuit Courts of Appeals. (*Bethlehem Shipbuilding Corporation* v. *National Labor Relations Board*, 120 F. (2d) 126.)

However, if a post-verdict motion is required under Rule 50(b) to give the trial court a last chance to correct his errors and save the hardship and expense of an appeal, logic and common sense impels the conclusion that a *specific* and *detailed* motion for a new trial performs the same function as to the last chance theory of the trial court that is performed by a post-verdict motion for judgment. To begin with, a motion for a new trial must be specific. A motion for judgment need not be specific as it automatically refers to the previously reserved motion for a directed verdict. The post-verdict motion for judgment can consist of four words, such as "Defendant moves for judgment." The important point is that the previously reserved motion for a directed verdict is the basis of a party's right to a final disposition in his favor.

The respondents' motion for a new trial in the instant case not only embraced, but amplified, the respondents' previous motion for a directed vedict. Consequently, regardless of the label "new trial" designated in respondents' post-verdict motion, the legal significance of the motion for a new trial under Rule 50(b) was the same and even more than the meaningless ritual in the instant suit that the respondents would have performed had they filed a paper saying "Defendants move for judgment."

In the *Cone* decision this Court predicated its last chance theory on *Greer* v. *Carpenter*, 323 Mo. 878, 882, 19

S. W. (2d) 1046, 1047. This last chance theory is the crux of the *Cone* decision. The *Greer* case indicates by a reference to other cases, that a trial court has this last chance to correct its errors by a motion for a new trial.

In *Maplegreen Co.* v. *Trust Co.*, 237 Mo. 350, 141 S. W. 621, 624, which is cited in the *Greer* case, the Supreme Court of Missouri said:

> "2. (b) A motion for a new trial in the system now in vogue fills a substantial and useful office in administering justice through the courts. Questions are suddenly sprung on a trial judge by versatile and ingenious counsel during the hotfoot of a trial, which he perforce must decide without taking time to consider. No mortal judge is allowed to be so incomparably recondite and ready as to know all the law all the time. If he know all the law some of the time, or some of the law all of the time, or some of the law some of the time (thereby putting himself outside of the class of those who know none of the law, none of the time), he rises to a permissible high-water mark of excellence. Accordingly the office of a motion for a new trial is to gather together those rulings complained of as erroneous, and solemnly and formally present them, one by one, in black and white to the judge, in order that he have a last chance to correct his own errors without the delay, expense, or other hardships of an appeal. This on the theory that even a judge is entitled to a last chance—a locus pœnitentiæ. Furthermore, the office of that motion has come to be to preserve and fix errors to be reviewed in the record, to mark them for review, by another ruling on the motion itself, on which, when exception is taken and preserved, the whole matter is brought up for correction."

At page 11 of our additional brief, we cited other causes that establish the well-settled rule that one of the functions of a new trial is to afford the trial court a last chance to correct his own errors without the delay, expense, or other hardships of an appeal.

March v. *Philadelphia & Westchester Traction Co.*, 285 Pa. 413, 418, 132 A. 355, 357, cited in the *Cone* decision indicates that a motion for a new trial exercises the same function as a motion for judgment notwithstanding the verdict, in giving the trial court a last chance to correct his errors. In that case, the defendant moved for judgment notwithstanding the verdict, but did not file a separate motion for a new trial. The trial court in that case dismissed the motion for judgment, but granted a new trial.

In the case at bar, the trial court was told repeatedly throughout the course of the case of the respondents' basic defense that they refused to warrant the goods because of their agency status, and because they did not see or handle the goods. This basic defense was contained in the respondents' opening statement, their amended answer, and in their arguments on various motions during the hearing. This basic defense was ignored consistently and repeatedly by the trial court. It was again repeated in the post-verdict motion for a new trial filed by the respondents. The trial court then had the identical opportunity to correct his erroneous rulings as he would have had if the respondents had gone through a meaningless ritual of saying on paper "Defendants move for judgment." The respondents' detailed motion for a new trial was a more pointed warning to the trial court of his erroneous rulings than this mere lip service, diluted motion for judgment would have been.

Although the respondents' motion for a new trial referred to "contested issues of fact," this was a mistaken description of those issues at the time the motion was filed in the trial court, as it is now clear beyond all doubt that there are no contested issues of fact. It is obvious that respondents' motion for a new trial was a last chance

and attempt to salvage at least a new trial from a hostile judge who had erroneously ruled against the respondents on practically every ruling during the course of the trial.

Under these circumstances, we believe it becomes "curiouser and curiouser," in the words contained in *Alice in Wonderland*, and reaches the realm of pure fantasy to expect a trial judge to suddenly see the light and correct his errors by a four word motion "Defendants move for judgment," and not see the same light in a detailed motion for a new trial, which specifically points out his errors and gives him the chance to correct them.

We therefore believe that if Your Honors still hold that a post-verdict motion is necessary under Rule 50(b) to empower the Circuit Court of Appeals to make a final disposition of a case on appeal, this post-verdict motion, in the language of the *Cone* case, can be "either/or," that is to say, *either* a motion for judgment *or* a motion for new trial, particularly a motion for new trial that is detailed and specific. In the instant suit, the respondents, in apt time, made a post-verdict motion for a new trial that specifically called the court's attention to its errors and gave the trial court a last chance to correct his errors without the delay, expense, or other hardships of an appeal, so that the Circuit Court of Appeals did have full power to make a final disposition of the instant suit.

3.

This Court should have ruled under its own decisions, that no part of the deposition of Todes was admitted in evidence as the record is clear and conclusive that no part of these depositions were read to the jury.

This Court, in its initial decision in the instant suit, said:

> "Furthermore, the very circumstances which arose in this case emphasize the importance of having the District Court first pass upon whether its error should result in a new trial or in a judgment finally ending the controversy. For there is here a dispute between the parties whether all or certain parts of a deposition containing important evidence were properly introduced in the trial court. Both parties took the position in the Circuit Court of Appeals that some, though different portions of the deposition, were properly presented in evidence. The Circuit Court of Appeals decided the case on the assumption that no part of the deposition was ever admitted as evidence. In this Court respondents argue that no part of the deposition was ever read to the jury and therefore no part of it can be considered as introduced in evidence. Whether this deposition or any part of it was properly before the court, and even if it were not before the court, whether the ends of justice required that a new trial be granted in order that the evidence it contained might properly be offered, were questions which the petitioner was entitled under Rule 50(b) to have passed upon in the first instance by the trial court."

In the instant suit, how could a four-word motion "Defendants move for judgment" have induced the trial judge to make any other ruling on the Todes depositions? To begin with, there was no controversy between the parties concerning the nature of the trial court's rulings on the Todes deposition until *after* the Circuit Court of Appeals had rendered its first decision (Rec. 230-232). There was no controversy about the Todes deposition in the minds of either the trial court or any of the parties *during the trial court proceedings* as to what parts of the deposition the trial court stated was introduced in evidence. Merely because a controversy arose *later* between the parties *on appeal* as to the *legal effect* of what happened in the trial court concerning the depositions, in view of the completeness of the record in the

instant suit, this Court under its own decisions has the power to make a complete and final ruling as to the legal effect of these depositions. It is clear beyond all doubt that no part of the depositions was ever read to or before the jury. This is undisputed and beyond any controversy. Merely because the parties, on appeal, indulged in a controversy as to the *legal effect* of certain rulings of the trial court concerning the depositions, this later dispute on appeal does not present a controversy as to the existence, omission or availability of the facts. All the facts in the entire deposition were before the trial court. This debate about the depositions is not of the same character as the element of the existence of an important missing witness, as in *Bunn* v. *Furstein*, 153 Pa. Super., 637, 638, 34 A. (2d) 924, cited at page 216 of this Court's decision in the *Cone* case. In the *Bunn* case not only was the trial court cognizant of the missing witness, but the entire decision was based on this element.

This legal argument in the instant suit about the depositions is entirely foreign to the factor of erroneous evidence introduced by the plaintiff in the *Cone* case, which might be corrected or supplanted by a new trial. This controversy about the depositions in the instant suit is not in the same class as that character of cases pointed out by Your Honors in the *Cone* case where a trial court is about to direct a verdict because of the failure of proof in a certain aspect of the case and at that time the litigant might know or have reason to believe that he could fill a crucial gap in the evidence.

Even if the entire Todes deposition had been admitted in evidence by the trial court, or if the entire Todes deposition might be admitted in evidence on a retrial of this case, because of the undisputed facts in the case, the result would still be the same as that determined by the Circuit Court of Appeals, so that the petitioner would have

no valid claim against the respondents. No matter how many times this case might be retried, the admission of Lazarus is conclusive and decisive, that the respondents refused to warrant the goods. The pettiioner was so anxious to procure the goods that it purchased the merchandise through the respondents as agents, with the distinct understanding and agreement that the respondents refused to warrant the goods. The petitioner was so anxious to get the goods that it paid Todes, respondents' salesman, a separate substantial finder's commission.

We believe Your Honors should issue a supplemental or modified opinion in the instant suit holding that the Circuit Court of Appeals was correct in deciding that no part of the Todes deposition was properly introduced in evidence as no part of the deposition was read to the jury. There can be and there is no controversy about this. (*Barney* v. *Schmeider*, 9 Wall. 246, and *Hodges* v. *Easton*, 106 U. S. 408.)

4.

This Court overlooked in its decision in Cone v. West Virginia Pulp & Paper Co., 330 U. S. 212, and in its decision in the instant suit, the important factor that under Rule 50(b) a trial court, on its own motion, may grant a previously reserved motion for a directed verdict for a party after the verdict of the jury is received, without a post verdict motion of either party. Therefore, since the trial court has this power, the Circuit Court of Appeals, on appeal, has the same power.

We do not believe that this point was argued in the *Cone* case. We touched on this point in our discussion under Point 2 of this petition for rehearing.

We believe it is clear from the very wording and purpose of Rule 50(b) that it is not mandatory for a party to make a post-verdict motion in order to have the trial court grant the movant's previously reserved motion for a directed verdict. Under the specific wording of Rule 50(b), even if a motion for a directed verdict is denied before the case goes to the jury, it is deemed automatically reserved to await the court's subsequent ruling after the jury's verdict is received. It is therefore a natural act for the trial court immediately or shortly after a jury's verdict is received, to rule *on its own motion* in a proper case that it will grant in a proper case a party's motion for a directed verdict, regardless of the jury's verdict. This practice is well settled and has been followed by various courts since the adoption of Rule 50(b). (*Western Union Telegraph Co.* v. *Dismay*, 106 F. (2d) 353; *Lux* v. *Western Casualty Co.*, 107 F. 1002; *Demers* v. *Railway Express Agency*, 108 F. 107.)

Now, if the trial court has this power without any post-verdict motion by a party to the suit, we believe it must follow that in a case involving questions of law only on undisputed facts, that the Circuit Court of Appeals has the same power and can make a final disposition of the case. A post-verdict motion by a party, if the motion is specific, as a motion for a new trial must be, certainly assists the trial court in passing on the previously reserved motion for a directed verdict, whereas the same general, diluted motion saying "Defendants move for judgment" is of no assistance to the trial court.

In view of the matters set forth under this Point 4 of our petition for rehearing, we believe Your Honors should modify the holding in the *Cone* case and in the instant suit, that if a post-verdict motion is necessary under Rule 50(b) in order to empower the Circuit Court of

Appeals to make a final disposition of the case in cases involving only questions of law where the facts are undisputed, the Circuit Court of Appeals can make a final disposition of the case where the appellant has filed *either* a motion for a new trial *or* a motion for judgment.

In the instant suit, the respondents having filed a detailed motion for a new trial, the trial court had full and complete opportunity to correct his errors without the delay, expense, or other hardships of an appeal.

Response to Petitioner's Petition for Rehearing.

The petitioner's petition for rehearing suggests a partial, piece-meal handling of this case, which is in the "heads I win, tails you lose" category. As we pointed out previously, even if the entire deposition is considered as having been introduced in evidence, the ultimate facts in this law suit would be the same as determined by the Circuit Court of Appeals. Moreover, under the very cases decided by this Court and cited frequently by the petitioner in its briefs, no part of the Todes deposition was ever introduced in evidence, because none of the depositions were read to the jury. (*Barney* v. *Schmeider*, 9 Wall. 246, and *Hodges* v. *Easton*, 106 U. S. 408.)

We agree with the statement contained in petitioner's petition for rehearing at page 2, that:

> "As this Court notes in its opinion, the Circuit Court of Appeals disposed of the case upon the assumption 'that no part of the deposition was ever admitted as evidence.' That issue is one which this Court is fully competent to decide as the Circuit Court of Appeals. It involves merely an examination of the printed record."

For the foregoing reasons, the undersigned respectfully requests that the petitioner's petition for rehearing be denied and that the respondents' petition for rehearing should be allowed, so that this Court should modify its initial opinion in the instant suit and hold that the respondents' motion for a new trial was a compliance with Rule 50(b) of the Federal Rules of Civil Procedure, and that the Circuit Court of Appeals had the power and jurisdiction in reversing the judgment of the trial court, to remand the case to the District Court, and to direct that court to enter a judgment in favor of the respondents.

Respectfully submitted,

NAT M. KAHN,
Attorney for Respondents.

I, Nat M. Kahn, attorney for the respondents, do hereby certify that the foregoing petition for rehearing has been presented in good faith and not for the purpose of delay.

/s/ NAT M. KAHN
NAT M. KAHN.

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SUPREME COURT OF THE UNITED STATES

No. 205.—October Term, 1947.

Globe Liquor Company, Inc., Petitioner, v. Frank San Roman and Dorothea San Roman, doing business under the firm name and style of International Industries.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[January 5, 1948.]

Mr. Justice Black delivered the opinion of the Court.

The petitioner, Globe Liquor Company, Inc., brought this action in Federal District Court against respondents, Frank and Dorothea San Roman, doing business under the name of International Industries. The complaint claimed damages for an alleged breach of warranty in the sale of certain liquors. An answer was filed; issues were appropriately joined. After all the evidence had been introduced, each party requested a directed verdict. The petitioner's motion was granted, verdict was returned in its favor, and judgment was accordingly entered. The respondents then moved for a new trial on the ground among others that there were many contested issues of fact which should have been submitted to the jury. They did not move for judgment under Rule 50 (b) of the Federal Rules of Civil Procedure, which provides in part: "Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; . . . . A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned

the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed." On appeal the Circuit Court of Appeals not only set aside the judgment in favor of the petitioner but also remanded the case to the District Court with directions to enter judgment for the respondent. 160 F. 2d 800. We granted certiorari to consider the apparent inconsistency between this latter action of the Circuit Court of Appeals and our holding in *Cone v. West Virginia Paper Co.*, 330 U. S. 212.

In the *Cone* case we held that the Circuit Court of Appeals was without power to order the entry of final judgment for the loser of a jury verdict in the District Court where he had failed to follow his motion for directed verdict with a timely motion for judgment as required by Rule 50 (b). We pointed out in the *Cone* case that Rule 50 (b) vested district judges with a discretion, under the circumstances outlined in the rule, to choose between two alternatives: (1) reopening the judgment and granting a new trial, and (2) ordering the entry of judgment as if the losing party's request for directed verdict had been granted by the trial judge.

It is urged that the reasons which supported the *Cone* decision are not relevant here because, unlike the *Cone* case, the jury in this case returned its verdict under specific directions of the trial judge. However significant this variance between the two cases might be for some purposes, it is of no importance here. By its terms the rule applies equally to cases where the verdict returned by the jury was not directed, as in the *Cone* case, or was directed, as in this case.

Furthermore, the very circumstances which arose in this case emphasize the importance of having the District Court first pass upon whether its error should result in a new trial or in a judgment finally ending the contro-

versy. For there is here a dispute between the parties whether all or certain parts of a deposition containing important evidence were properly introduced in the trial court. Both parties took the position in the Circuit Court of Appeals that some, though different portions of the deposition, were properly presented in evidence. The Circuit Court of Appeals decided the case on the assumption that no part of the deposition was ever admitted as evidence. In this Court respondents argue that no part of the deposition was ever read to the jury and therefore no part of it can be considered as introduced in evidence. Whether this deposition or any part of it was properly before the court, and even if it were not before the court, whether the ends of justice required that a new trial be granted in order that the evidence it contained might properly be offered, were questions which the petitioner was entitled under Rule 50 (b) to have passed upon in the first instance by the trial court. What we said in the *Cone* case is peculiarly appropriate here: "The determination of whether a new trial should be granted or judgment entered under Rule 50 (b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart." It was error therefore for the Circuit Court of Appeals to direct the District Court to enter judgment for the respondents.

Petitioner also strongly urges that the evidence in the District Court was such that the trial judge was justified in directing a verdict in its favor and that the judgment resting on that verdict should be reinstated. Whether a verdict should have been directed, however, depends upon a number of factors, including an interpretation of the law of Illinois where the contract was made, a proper interpretation of the pleadings, a determination whether the disputed deposition was admitted in evidence in whole or in part, and the effect of that evidence if admitted.

Under these circumstances, the judgment of the Circuit Court of Appeals in reversing and remanding the cause to the District Court is affirmed. But since the respondents made no motion for judgment under Rule 50 (b), it was error to direct the District Court to enter a judgment in their favor. The case should go back to the District Court for a new trial.

It is so ordered.